80-2184

No. .....

Office-Supreme Court, U.S.
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JUN 25 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1981

SINDELL, LOWE & GUIDUBALDI,
A PARTNERSHIP, *et al.*,
Petitioners,

vs.

ATTORNEY GENERAL OF OHIO,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JAMES A. LOWE, *Counsel of Record*
SINDELL, LOWE & GUIDUBALDI CO., L.P.A.
910 Leader Building
Cleveland, Ohio 44114
(216) 781-8880
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Does a trial court in a civil rights case have the legal authority to extinguish an attorney's reasonable contingency agreement with his client without notice or hearing to that attorney?

2. Does a trial court in a civil rights case have the legal authority to extinguish an attorney's reasonable contingent fee agreement because it is the only way to effectuate a settlement of the case, thereby avoiding a lengthy trial and possible subsequent appeal?

3. Does a trial court in a civil rights case have the legal authority to issue an order prohibiting an attorney from properly enforcing a reasonable contingent fee agreement in a state court, after having extinguished that agreement in order to effectuate a settlement between the parties without notice or hearing extended to the affected attorney?

4. Does a trial court in a civil rights case have the legal authority to nullify a reasonable contingent fee obligation of a client to his attorney where the attorney has not been discharged by the client for good cause, on the ground that the client in the exercise of a personal preference limited the attorney to a secondary role as counsel after that attorney had previously spent thousands of hours spanning several years pursuant to the contingent undertaking, successfully litigating at the appellate level the right to sue, thereafter extensively engaging in voluminous trial discovery, then actively trying the case for sixteen weeks, thereafter remaining at all times available and able to serve his clients as requested up to and including the point of settlement?

5. May an enactment by a State Legislature which offers a monetary settlement to plaintiffs in a civil rights action expressly condition that offer upon the extinguishment of a reasonable attorney fee agreement between the plaintiffs and their attorney, without transcending the limits of Article I, Section 10 of the United States Constitution prohibiting states from passing any law impairing the obligation of contracts?

LIST OF PARTIES

The petitioners are Sindell, Lowe & Guidubaldi Co., L.P.A. (formerly a partnership) and its individual members, 910 Leader Building, Cleveland, Ohio, 44114. Their attorney is James A. Lowe, 910 Leader Building, Cleveland, Ohio 44114.

Plaintiffs-Beneficiaries in the courts below (the Plaintiffs in the "Kent State Cases") were represented by Stephen V. Bomse, 44 Montgomery Street, San Francisco, California 94104. Respondent is the Attorney General of Ohio, Columbus, Ohio 43215. Attorneys for the respondent are Burt Fulton and Virginia L. Reichard, 630 Bulkey Building, Cleveland, Ohio 44115.

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No. .....

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OPINIONS BELOW

Announcement and Settlement and Dismissal
he trial court are reproduced in the Appendix to
n at pages A1 and A3 respectively.

ral Opinion of the trial court of February 6, 1979
the Appendix at page A8.

ral Ruling of the trial court of March 9, 1979
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udgment Entries of the trial court of March 12,
h 15, 1979 and March 26, 1979 appear in the Ap-
pages A26, A42, and A46 respectively.

rder of the Court of Appeals for the Sixth Cir-
roduced in the Appendix at page A51.

JURISDICTION

der of the Court of Appeals for the Sixth Circuit
d on March 27, 1981. The jurisdiction of this
voked under 28 U.S.C. §1254(1) and Rule 17 of
e Court Rules, effective June 30, 1980.

TUTIONS AND STATUTES INVOLVED

I, Section 10, Constitution of the United States
pertinent part:

tate shall . . . pass any . . . Law impairing the
ion of Contracts, . . ."

II, Section 28, Constitution of the United States
pertinent part:

general assembly shall have no power to pass
s impairing the obligation of contracts; . . ."

vil Rights Attorney's Fees Awards Act of 1976,
, 42 U.S.C. §1988 provides, in relevant part:

court, in its discretion, may allow the prevail-
ty . . . a reasonable attorney's fee as part of the

STATEMENT OF THE CASE

ng the historic events of May 4, 1970 on the
Kent State University, those who had been in-
the families of those who had been killed re-
sel to represent them in pursuing their claims
amages. With the exception of the Scheuer
ch retained the American Civil Liberties Union

n agreement, all of the plaintiffs retained
l as their counsel.

plaintiffs who retained him signed written
nising to pay Sindell one-third of the pro-
covery which might be obtained on their
vritten agreements also provided that in
overy was made, the plaintiffs would not
Sindell for attorney's fees in any amount

in keeping with his employment, Sindell
plaintiffs in a variety of actions in the
on Pleas of Cuyahoga County, Ohio, the
ppeals for the Eighth Judicial District, the
Court, the United States District Court
District of Ohio, the United States Court
the Sixth Circuit and the United States
(in which a unanimous Court held that
tal officials could be held accountable in
or the deprivation of the plaintiffs' civil
n in the United States District Court for
trict of Ohio throughout a jury trial which
ximately sixteen weeks. Although that
ted in a defendants' verdict, Sindell iden-
ed the issue for appellate review upon
d States Court of Appeals for the Sixth
ly reversed the case and remanded it for

ne first trial the American Civil Liberties
perating attorneys took the responsibilities
by agreement of all concerned. Nonethe-
tinued to remain involved as an attorney
ntiffs.

ıding his acknowledgment that these facts
ed to him in December, 1978, the trial judge
ttlement with the American Civil Liberties
resentatives of the State of Ohio which
anuary 4, 1979 in an Order which effectively
Sindell's (and other private counsel's) con-
ract rights and established a fund of $50,-
for all of the private counsel in the Kent
his occurred several days after the com-
ıe retrial.

was taken without the benefit of any hear-
vidence whatsoever, nor was any advance
ion given.

ent hearings relating to the distribution of
ial court initially relied for support of its
ivil Rights Attorney's Fees Awards Act of
. §1988, as amended). However, as the
ourt of Appeals for the Sixth Circuit later

nas found no exact controlling precedent
ons which he felt required to take, nor do

prosecuted their appeal from the Orders of
rt of January 4, 1979 and March 12, 1979.
peals, finding that ". . . this case is unique
f litigation in the United States Courts",
affirming the District Court on March 27,
tion for Writ of Certiorari was thereupon
Court.

OR GRANTING THE WRIT

eets the criterion for review on Cer- Rule 17(c) of the Supreme Court Court to decide an important question has not been, but should be, settled by

les of law which apply to the award of y's fee in civil rights cases and to the Court to extinguish private contingent

ircuits have analyzed the extent of a ers in awarding a "reasonable" fee s Attorney's Fees Awards Act of 1976 al of the circuits have addressed the ourt, acting in its discretion, to modify ients.

it decision in this case runs counter sly decided cases and this Court has ssues presented here.

see *Johnson v. Georgia Highway Ex-* 14 (5th Cir. 1974); *Fountila v. Carter,* r. 1978); *Northcross v. Board of Edu-City Schools,* 611 F.2d 624 (6th Cir. ed 1980); *Cappel v. Adams,* 434 F.2d *Buxton v. Patel,* 595 F.2d 1182 (9th *v. Sharp,* 579 F.2d 645 (1st Cir. 1978).

tice in this case, to settle the confusion ircuits and to provide a meaningful hich to assess retroactively contingent vil rights matters, this Court should sented here for review.

n this case is patently outrageous. l court felt so compelled to settle omplex piece of litigation that he ar- settlement, and virtually eliminated nt fee agreement without notice to and without giving that attorney an d.

s done behind closed chamber doors ne affected attorney, but was also ith a legislative enactment expressly ingent fee contracts.

for the harsh limitation of attor- e attorney played no role in bringing result. This justification unfortu- ct that the attorney in question had ours spanning several years in se- sue on the appellate level without ave ever been prosecuted; moreover, ignored the fact that a record was eks of trial which contained the basis n adverse jury verdict and also the hich lasted only a few days before ade.

al court then sought to prohibit en- ingent fee agreements in state court.

Attorney's Fees Awards Act of 1976 mended) was never intended to per- o more than assess part or all of a s against a defendant, or to do more dering of such a payment of attor- o agreement of the parties.

ionable contingent fee agreement, a ted with the authority to set such

arbitrary ground that such an
tle the case. An attorney who
ractual obligation should not be
ment himself via the enforced
airly earned fee. A trial court
the reality, however stressful,
ettled no matter how much the

greed upon attorney's fee been
Kahler, the most seriously in-
eceived in the area of a quarter
of $350,000.

on a contingent fee agreement
payment of fees if there was
an attorney for payment none-
obvious response that such was
g. Why then should it be any
btained through the long labor
eks the application of the other

fees were to be treated on the
if there is no recovery, but if
there might or might not be a

ly threatens the ability of any
ontingent fee agreement. The
clearly benefits clients without
nsel, clients whose rights would
rdized. If attorneys could not
recognition of a reasonable con-
en many people would likely
on.

The Kent State litigation, while unique in many ways, is not so unique as to permit the arbitrary judicial indifference for the right of a faithful, hard-working attorney to a fair shake.

There is no known authority even remotely authorizing this kind of unbridled ex parte judicial action. In our view, the consequences of allowing this kind of judicial action to stand unreviewed are potentially dire for countless private attorneys and clients otherwise unable to afford them throughout the country.

CONCLUSION

For the reasons set forth above, petitioners urge that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JAMES A. LOWE
910 Leader Building
Cleveland, Ohio 44114
Counsel of Record for Petitioners

APPENDIX

ANNOUNCEMENT OF THE UNITED STATES DISTRICT COURT ACCOMPANYING SETTLEMENT AND DISMISSAL ORDER

(Filed January 4, 1979)

The 13 Kent State civil damage cases are settled and will be terminated.

Settlement negotiations began on the weekend of November 12. These negotiations came to a dead stop on December 1.

Following a court session on Sunday, December 3, negotiations resumed.

Later on Sunday, this court recommended to all parties a total settlement amount of $675,000 to be paid the plaintiffs. I conclude that this amount is fair and reasonable to all concerned under all the circumstances.

The principal terms of the settlement that has been reached are incorporated in a journal entry which I will later read.

Wednesday morning, December 6, the plaintiffs agreed to accept the recommended settlement. Likewise, the defendants agreed that such a sum was satisfactory if paid on their behalf by the State of Ohio.

As a condition of the settlement, the plaintiffs had requested a statement of a certain content to be signed by the defendants. Various proposed drafts of the statement were unacceptable to one side or the other. By Wednesday, wording was achieved that satisfied the plaintiffs and the defendants.

At the same time, the defendants requested particular language to be incorporated in the mutual releases which

the plaintiffs and the defendants will individually sign. Plaintiffs agreed to this language.

Subsequently I will read the statement and the pertinent language of the releases.

Of course the cases could not be settled until and unless the State of Ohio agreed to pay the settlement sum of $675,000.

Just a few minutes ago the State Controlling Board committed the State to pay the settlement sum.

I commend Ohio's legislative leaders, the State Controlling Board and the Attorney General for agreeing to take the action that will provide the settlement fund.

In ending these cases now the cost of defense of a protracted trial can be diverted to the settlement fund. There are other gains.

A settlement of these cases spares the parties—plaintiffs and defendants—the trauma, the anguish, and the uncertainties of a trial that is reliving the events of those days in early May of 1970.

Continuing the trial of these cases would vicariously cause likely injury to the reputation and well being of a great university. That probable harm will be avoided.

There is also incalculable benefit to our beloved State of Ohio in finally closing this chapter in our state's history.

I now read the Journal Entry that I have signed and filed this morning.

I next read pertinent language from the mutual release which each party is executing.

Finally, I read the statement which each defendant is signing.

SETTLEMENT AND DISMISSAL ORDER OF THE UNITED STATES DISTRICT COURT

(Filed January 4, 1979)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, Administrator of the Estate of ALLISON KRAUSE, Deceased,	C70-544 C71-470
VS.	
JAMES A. RHODES, *et al.*	
SARAH SCHEUER, Administratrix of the Estate of SANDRA LEE SCHEUER, Deceased,	C70-859 C72-439
VS.	
JAMES A. RHODES, *et al.*	
ELAINE MILLER HOLSTEIN, Administratrix of the Estate of JEFFREY GLENN MILLER, Deceased,	C70-816
VS.	
JAMES A. RHODES, *et al.*	
LOUIS A. SCHROEDER, Administrator of the Estate of WILLIAM K. SCHROEDER, Deceased,	C71-20
VS.	
JAMES A. RHODES, *et al.*	

DEAN KAHLER, ELAINE KAHLER, JOSEPH JOHN LEWIS and ELIZABETH LEWIS,	)	C71-471
VS.	)	
JAMES A. RHODES, *et al.*	)	
JOHN R. CLEARY and ROBERT CLEARY,	)	C71-21
VS.	)	
JAMES A. RHODES, *et al.*	)	
DONALD SCOTT MACKENZIE,	)	C71-22
VS.	)	
JAMES A. RHODES, *et al.*	)	
DOUGLAS WRENTMORE,	)	C71-23
VS.	)	
JAMES A. RHODES, *et al.*	)	
JAMES D. RUSSELL,	)	C71-25
VS.	)	
JAMES A. RHODES, *et al.*	)	
THOMAS M. GRACE and THOMAS V. GRACE,	)	C71-24
VS.	)	
JAMES A. RHODES, *et al.*	)	

M. CANFORA,	)	C71-26
	)	
VS.	)	
	)	
s A. RHODES, *et al.*	)	
RT F. STAMPS and FLOYD STAMPS,	)	C73-643
	)	
VS.	)	
	)	
s A. RHODES, *et al.*	)	

SETTLEMENT AND DISMISSAL ORDER

The Court having recommended to all parties that the oned cases should be settled and terminated upon ayment to the plaintiffs of $675,000 and upon the later stated, and all parties having agreed to said ment payment and terms,

And the State Controlling Board having today, Jan- 4, 1979, committed and approved a settlement fund 75,000,

T IS ORDERED:

. $600,000 shall be paid to the plaintiffs (as itemized in the attached list), $50,000 as payment in full for attorney fees, and $25,000 as out-of-pocket expenses. The settlement fund of $675,000 shall be paid to Sanford Jay Rosen, trustee, for distribution.

. Mutual releases for and from all claims and causes of action shall be executed by all parties.

. The agreed-to statement shall be signed by the defendants.

Upon completion of terms, 1, 2 and 3, this court will enter a separate order reading "Settled and Dismissed with Prejudice, costs to be taxed" in each captioned case.

/s/ WILLIAM K. THOMAS
United States District Judge

DISTRIBUTION LIST

KAHLER	$ 350,000
JR KRAUSE, Administrator of the Es- of ALLISON KRAUSE, Deceased	15,000
I SCHEUER, Administratrix of the Es- of SANDRA LEE SCHEUER, Deceased	15,000
E MILLER HOLSTEIN, Administratrix e Estate of JEFFREY GLENN MILLER, ased	15,000
A. SCHROEDER, Administrator of the e of WILLIAM K. SCHROEDER, De- d	15,000
CANFORE	15,000
CLEARY	22,500
RACE	37,500
H LEWIS	42,500
LD SCOTT MACKENZIE	27,500
D. RUSSELL	15,000
T F. STAMPS	15,000
LAS WRENTMORE	15,000

ot of Mutual Release)

ile denying all liability as to the claims of the plain- t desiring to compromise and terminate these dis- laims of the plaintiffs, JAMES A. RHODES; SYL- R DEL CORSO; ROBERT CANTERBURY; ROD-

BIDDLE; DWIGHT A. CLINE; CHARLES
INGER; HOWARD R. FALLON; OKEY R.
; WILLIAM F. E. HERSCHLER; ROBERT D.
HARRY D. JONES; RICHARD LOVE; BARRY
RIS; JAMES D. McGEE; MATTHEW O. Mc-
LARRY RALPH MOWRER; JOHN E. MARTIN;
C. PRYOR; WILLIAM E. PERKINS; JAMES E.
RUSSELL EUGENE REPP, JR.; LAWRENCE
ER; LEON H. SMITH; RAYMOND J. SRP;
R. SNYDER; ALEXANDER D. STEVENSON;
LLOYD THOMAS, JR.; and RALPH WILLIAM
hereby consent to and agree with the payment
te to the plaintiffs named above.

rospect, the tragedy of May 4, 1970 should not
rred. The students may have believed that they
in continuing their mass protest in response to
odian invasion, even though this protest followed
g and reading by the University of an order to
and an order to disperse. These orders have
determined by the Sixth Circuit Court of Ap-
ve been lawful.

of the Guardsmen on Blanket Hill, fearful and
om prior events, may have believed in their
that their lives were in danger. Hindsight sug-
another method would have resolved the con-
Better ways must be found to deal with such
ions.

evoutly wish that a means had been found to
May 4 events culminating in the Guard shoot-
he irreversible deaths and injuries. We deeply
se events and are profoundly saddened by the
four students and wounding of nine others which
We hope that the agreement to end this litigation
to assuage the tragic memories regarding that

OPINION OF THE UNITED STATES DISTRICT COURT

(Filed February 6, 1979)

A. Sindell, his law firm and its individual mem-
n A. Sindell hereafter), have filed a notice of
this court's January 4, 1979 settlement and
der entered in the 13 Kent State civil damage

articularly, these attorneys appear to be ap-
portion of the January 4 order that states:

ORDERED:

shall be paid to the plaintiffs (as itemized in
ched list), $50,000 as payment in full for attor-
, and $25,000 as out-of-pocket expenses.

nts make application for a stay of the Settle-
ismissal Order of this Court on January 4, 1979
peal and for an Order granting an injunction
pendency of the within appeal restraining San-
en, trustee, from distribution of the settlement
,000.

ppellate Rule No. 8 requires that any request
r injunction pending appeal should be heard in
tance by the district court, this application has
hearing this morning.

ubtful that the order of January 4 constitutes a
The order on its face in paragraph 4 states:

ompletion of terms 1, 2 and 3, this court will
separate order reading "settled and dismissed
rejudice, costs to be taxed" in each captioned

ttled and dismissed entry goes on in each
events since January 4 will require several
this court's jurisdiction. One of those
court's jurisdiction,

er and adjudicate through Sanford J. Rosen,
e distribution of the $675,000 settlement
ord with terms and conditions of this court's
and termination order of January 4, 1979 and
ty with the express intent of the State Con-
ard in appropriating and payment of the
fund of $675,000.

hat until this court enters a separate entry
nd dismissal with prejudice in each of the
will be no final order from which appellant
ll may prosecute any appeal of this court's
rs.

le absence of a final order leads this court
sider entry of the requested stay.

ecause the appellant may nonetheless pur-
from this court's order of January 4, 1979,
ntitled to know that even if the January 4,
e determined by the Sixth Circuit Court
e a final order, this court would deny ap-
tion for a stay.

ing that leads to this conclusion should be

ated January 16, 1979, Robert F. Howarth,
f the State Controlling Board presented to
in the amount of $675,000.00.

he stated:

rized to act only pursuant to Controlling
est No. E47, as approved January 4, 1979.

with, please find a copy of this authoriz-
, with this court's Settlement and Dis-
incorporated therein and attached there-
A.

inued:

carefully note that the subject draft is
y under the terms of this court's Settle-
nissal Order upon which the Controlling
val is conditioned. In other words, any
f these funds other than as provided in
t and Dismissal Order would violate the
ler which the enclosed draft is presented.
our understanding that Mr. Sanford J.
tee for distribution will be accordingly
terms and conditions.

Controlling Board E47 Request for trans-
00 Kent State Settlement Fund specified:

to as "Exhibit A," and incorporated here-
e, is a document entitled Settlement and
der. As contemplated by the Order,
t is conditioned upon the terms and re-
forth therein.

nts are attached to Order One of this
which I delivered to Sanford J. Rosen
raft in the amount of $675,000.00. Order
ovides that Sanford J. Rosen is directed
usteeship pursuant to this court's Order
and the letter of President Howarth.

read, the order of January 4, 1979 spe-
shall be paid in full for attorney fees
t-of-pocket expenses. $600,000 shall be
fs as itemized in the attached list.

se breakdown and allocation of the
l of $675,000 that was presented to
intiffs and their counsel when this
iffs and their counsel on the morning
ber 6, before court opened.

ise were informed of and approved
eakdown.]

settlement fund and the breakdown
ed for each of the plaintiffs, $50,000
for attorney fees, $25,000 as out-of-
fully disclosed by me to President
e Ohio Senate and Speaker Vernon
se of Representatives. This occurred
e leaders met with me in this court
n of December 6, 1978.

med of the contingent fee contracts
nd other former counsel, I had fixed
for any contingent fee claim.

that the State of Ohio would not
settlement fund of $675,000 if the
charged against the fund or around
plaintiffs, I fixed $50,000 as payment
fees.

itation of attorney fees, there would
ent of the Kent State cases by the
s made clear by the express wording
lling Board request No. E47 which
vas approved on January 4, 1979.

umstances, this court, acting in its
U.S.C. §1988, as amended, allowed
nable attorney's fee" of $50,000.

at under some circumstances in
ecuted under section 1983, contin-
ed while additional attorney fees
ld not be allowed by the court.
F.2d 1039.

nt circumstances, in order to effect
this litigation which seemed as if
was indispensable that this court
section 1988 and that the fees
nd supercede any contractual con-
nsel of these plaintiffs.

ttlement it was necessary to limit
it is also fair under the circum-

ess hours of legal services have
lf of the plaintiffs by Steven A.
attorneys from the inception of
he unsuccessful first trial in late

that Steven A. Sindell did not
t obtained a new trial, without
been no second trial and no settle-
ded by Sanford Jay Rosen repre-
their successful appeal. These
er counsel, have represented the
ond trial and settlement.

rcumstances make it clear that
yed no part in creating the settle-
sonally attest to this fact. Yet,
rmined by this court to reserve
nt fund out of which to ratably
counsel who may have had con-
any of the plaintiffs.

y 25, 1979, I received a letter
aw firm over the signature of
ed in part as follows:

n against any individuals other
Trustee as stated herein, and
proved by Judge Thomas. Any
Steven A. Sindell in connection
unauthorized.

y 15, 1979, Joseph Kelner, lead
as written in pertinent part:

ndamental proposition that fees
ivate retainer agreements with
oject to supervision and control
lingly, if it is your "intent" as
that the distribution of funds
tlement shall supercede private
ve shall willingly abide by such

ry 2, 1979, Fred H. Mandell, one
l, has written me in part as fol-

I wrote to Mr. Rosen and for-
aim for fees out of the $50,000
at purpose in the court's order.
ourt will reflect the fact that I
n behalf of the following named
, Donald Scott McKenzie, James
ce, Lewis A. Schroeder, Admin-
ntmore and Allen Canfora. At
retained by the above-named
an agreement with them which
was to be 1/3 of any settlement
r to avoid duplication of efforts,

> I entered into an understanding with the firm of Sindell, Sindell and Sindell to share on a 50/50 basis any fees that I might be entitled to.
>
> . . . .
>
> I want the court to know that insofar as I am concerned, I am not asserting my right under the written agreements with my clients and that I am perfectly satisfied with the order of the court concerning the distribution to be made out of the funds set aside for attorney fees.

He then adds:

> I am sure that the court is thoroughly familiar with the fact that the students and their families have suffered indescribable hurt and trauma since the tragedy of almost 9 years ago and it would indeed be a sad commentary on the legal profession if lawyers representing the various parties would now do anything which could be looked upon as ghoulish insofar as a distribution of fees is concerned. I sincerely hope that this will not happen.

At this time the court is scheduled a hearing on March 9, 1979 for a presentation and consideration of claims for attorney fees to be distributed out of the $50,000 attorney fee fund; and at the same time, claims for payment out of the $25,000 out-of-pocket expense fund may be presented and considered.

The letters which have already been forwarded to Mr. Rosen pursuant to his request that all claims be submitted by January 30, 1979, need not be duplicated.

However, should any attorney desire to supplement his existing claim letter, he should first do so in writing,

sending a copy to Mr. Rosen, Trustee, for distribution of the fund, with a copy to this court. Counsel may also appear on March 9, 1979 at the aforesaid hearing to present a short argument in support of his claim.

A more precise order is being entered to cover this hearing of March 9, 1979.

ORAL RULING OF THE UNITED STATES DISTRICT COURT

(Filed March 9, 1979)

KRAUSE, *et al.*

v.

RHODES, *et al.*

ORAL RULING

In this court's oral opinion of February 6, 1979, today's hearing was scheduled,

> for a presentation and consideration of claims for attorney fees to be distributed out of the $50,000 attorney fee fund; and at the same time, claims for payment out of the $25,000 out-of-pocket expense fund may be presented and considered.

The record is now complete; and the court first proceeds to apportion the $50,000 attorney-fee fund provided for in the settlement of these cases.

I.

A.

In this court's memorandum of February 6, it was stated:

> Previously informed of the contingent fee contracts of appellant Sindell and other former counsel, I had fixed the $50,000 to provide for any contingent fee claim.
>
> Because I knew that the State of Ohio would not make payment of a settlement fund of $675,000 if the contingent fees were charged against the fund or against any of the individual plaintiffs, I fixed $50,000 as payment in full for all attorney fees.

This court then set forth grounds upon which it is confining all the fee claims of contingent fee counsel (including Steven A. Sindell) to the $50,000 attorney-fee fund, thereby modifying and superceding "any contractual contingent fees of former counsel of these plaintiffs." Those grounds are now reaffirmed.

Consistent with this court's action, *Grimes v. Chrysler Corp.*, 565 F.2d 841 (2nd Cir. 1977), recognizes a district court's authority in supervising the distribution of a settlement fund to exercise ancillary jurisdiction to resolve disputes over attorney fees between litigants and their counsel. *See also American Federation of Tobacco Growers v. Allen*, 185 F.2d 590 (4th Cir. 1951).

The present settlement fund involves "property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton Bank v. Hozier*, 267 U.S. 276, 280 (1925). Thus, this court acquires authority to resolve the ancillary controversy arising out of Steven A. Sindell's claim to seek attorney fees directly from his clients' apportionment of the plaintiffs' settlement fund of $600,000, and in excess of his share of the $50,000 attorney fee fund.

Finally, there is a strong equitable justification for this court's exercise of a limiting restraint upon the fees of

an officer of this court who would self-centeredly seek to deprive his clients of the full sums which the State of Ohio has specifically reserved for those plaintiffs.

B.

In fixing $50,000 "to provide for any contingent fee claim," conversely this court intended thereby to make no provision for attorney fees for counsel who have represented the plaintiffs in connection with the second trial—or for that matter, for any other attorney fees. When this court met on December 3, 1978 with present counsel to discuss the court's recommended settlement amount of $675,000, the court was informed, as the record now shows, that second trial counsel were employed by the ACLU; and plaintiffs are not obligated to pay any attorney fees to present counsel. Hence, this court determined that all the $50,000 set aside for attorney fees would be equitably apportioned among the former contingent fee counsel.

Lead counsel for the plaintiffs said as much to the plaintiffs when he wrote as follows to them on January 9, 1979:

> Some of you as clients had entered into contingent fee arrangements with the attorneys who first represented you in these cases. These agreements should not concern you at this point. The effect of those fee agreements has been radically changed by virtue of the course that this case has followed, the loss of the first trial, and the changes in the roles of the various attorneys. To my knowledge no attorney has advanced any costs which have not already been repaid. The legitimate entitlement to fees of those attorneys who have such an entitlement is amply provided for by the $50,000.00, specifically designated for that

purpose by the judge, and in the event the settlement order supersedes any previously negotiated fee agreements.

Bearing these things in mind, the court is forced to lieve that the concerted filings since February 6 of affivits of claims for attorney fees by 14 lawyers and 6 legal rkers employed and paid by the ACLU—total claims attorney fees in the amount of $731,927—are not serisly made but are a Newtonian reaction to the claim d demand of Steven A. Sindell.

In a letter of February 14, 1979, Bruce J. Ennis, legal rector of the American Civil Liberties Union states:

> It is our position that only lawyers who participated in the successful appeal to the Sixth Circuit or in the retrial and settlement should be entitled to a fee. We believe that lawyers who participated on a contingency fee basis only during the unsuccessful first trial should not be entitled to any fee.

Presumably this argument rests upon an instrument ted August 27, 1975 signed by the plaintiffs and their ntract counsel (Steven A. Sindell, Joseph Kelner, Fred Mandel), because Mr. Ennis in elaboration of his posin states in part:

> Since August 27, 1975, the ACLU has had the final responsibility for all costs of out-of-pocket expenses not reimbursed to ACLU by the United Methodist Church.

The instrument of August 27, 1975 reads in principal rt:

> The undersigned plaintiffs in the Kent State civil cases . . . do hereby agree that for purposes of all appellate proceedings in this litigation, the role and re-

sponsibilities of lead counsel shall be exercised by the legal staff and attorneys of the American Civil Liberties Union. . . .

Neither expressly nor impliedly does this agreement inate the written agreements between Steven A. ell, Joseph Kelner, and Fred Mandell and their re- ive clients. Moreover, essential as it was to authorize egal staff and attorneys of the American Civil Liber- Union to exercise "the role and responsibilities of lead sel" in "all appellate proceedings in this litigation," nstrument did not obligate the plaintiffs to compensate U counsel for their legal services.

The same thing can be said about the "retainer" ex- ed on December 4, 1977—this time solely by the plain-

This later instrument—executed after the Sixth Circuit t of Appeals ordered a new trial—provides:

The undersigned plaintiffs in the Kent State civil cases . . do hereby agree that for all purposes of retrial or settlement of this litigation the role and responsibilities of lead counsel shall be exercised by Sanford J. Rosen. He shall have final authority, subject only to plaintiffs' veto, to make all decisions in connection with retrial or settlement of this action, including selection of all attorneys and support personnel who work on this case, all decisions about trial strategy and tactics, and assignment of all specific tasks.

Immediately it is seen that there is no mention of to be charged the plaintiffs by either Mr. Rosen or counsel of his selection. Thus, the relationship be- n both Mr. Rosen and the attorneys of his selection the plaintiffs in the second trial corresponds to the

ship between Michael Geltner and the Scheuer fam-
described in Mr. Geltner's affidavit:

eface this affidavit by saying that it was my under-
nding from the start of the case that neither the
LU Foundation nor its cooperating attorneys ex-
ted to receive compensation for representing the
euer family.

ce no compensation was to be charged the Scheuer
in the first trial by either the ACLU Foundation
ooperating attorneys and since in the second trial
ntiffs were represented by the ACLU Foundation
cooperating attorneys (Mr. Rosen and his legal
without expecting to receive compensation from
ntiffs, the fee claims of neither the ACLU Founda-
any of its cooperating attorneys or legal workers
w be recognized. Hence, all affidavits of claims
the $50,000 attorney fee fund made by Bruce J.
director of the ACLU Foundation, by Sanford J.
lead counsel, and by all other ACLU counsel and
rkers are respectfully denied.

C.

pportioning the $50,000 attorney fee fund, the sev-
ps taken will be described. As a starting point,
rd of $15,000 to the Scheuer family is deducted
e $600,000 that is to be paid to all the plaintiffs.

ce at all times throughout the litigation the Scheuer
nas been represented by the American Civil Lib-
nion, the monies to be paid to the Scheuer family
not be part of the base used in determining the
ge of the total fund represented by the amount
each of the plaintiffs who have contingent fee
s with either Steven A. Sindell, Fred Mandel, or
Kelner.

percentages of the separate awards to all plaintiffs an the Scheuer family (based on $585,000), have culated and appear in the margin.[1] Applying rcentages to the $50,000 fund, the several shares 50,000, attributable to each plaintiff, are as follows:

hler	$29,915
Krause, Administrator of the Estate of Krause, Deceased	1,280
Miller Holstein, Administratrix of the of Jeffrey Glenn Miller, Deceased	1,280
Schroeder, Administrator of the Estate fery Glenn Miller, Deceased	1,280
nfora	1,280
ary	1,925
ce	3,210
ewis	3,635
Scott Mackenzie	2,355
. Russell	1,280
. Stamps	1,280
Wrentmore	1,280

Kahler	59.83%
Krause, Administrator of the Estate llison Krause, Deceased	2.56%
Miller Holstein, Administratrix of the te of Jeffrey Glenn Miller, Deceased	2.56%
A. Schroeder, Administrator of the Estate Villiam K. Schroeder, Deceased	2.56%
Canfora	2.56%
Cleary	3.85%
Grace	6.42%
Lewis	7.27%
l Scott Mackenzie	4.71%
D. Russell	2.56%
F. Stamps	2.56%
as Wrentmore	2.56%

pplied the percentage shares of the plaintiffs
00 settlement fund to the $50,000 attorney
next step is to assign to Steven A. Sindell,
and Joseph Kelner the collective shares of
ve clients (as determined by the several con-
ontracts).

A. Sindell has a total of $34,830 (Kahler,
Lewis). The $1,250 sum attributed to Arthur
nitted because on March 10, 1976 (prior to
1), Mr. Krause discharged Steven A. Sindell
n with which he was then affiliated . . . from
presentation of him in the Kent State litiga-
Krause sum of $1,250 will be apportioned

ndel has a total $12,610 (Schroeder, Canfora,
ce, Mackenzie, Russell, and Wrentmore).
r has a total of $1,280 (Elaine Miller Holstein).

ndel assigned 1/2 of his fees to Steven A.
iating him as co-counsel in the representation
lients.[8]

ve of the first trial, Joseph Sindell, partner
m of which his son Steven was also a partner,
oseph Kelner 20 percent of the Sindell firm's
he "Kent State litigation." This was about
. Kelner assumed the role of lead counsel

---

fidavit of David Engdahl subscribed 23 February
h 18.

ter of Fred H. Mandel, April 20, 1972 to his clients
ging letter accepting co-counsel status on a shared-
en to Fred H. Mandel, Esq. by Steven A. Sindell,

ffs, Ramsey Clark having departed as lead

elner previously had agreed to divide his
fee with the Sindell firm.

justments called for by the foregoing assign-
the adjusted total of fees are as follows:

Sindell, $33,420.[5]

del, $6,305 (1/2 of $12,610); and Joseph
$8,995 ($640 plus $8,355).

en to the allocation of the balance of $1,250
ttorney-fee fund (the Arthur Krause share),
s that David Engdahl (see his affidavit of
979) states under oath:

e period of the first trial of the Kent State
, extending from May, 1975, through most
, 1975, I worked as sole counsel for Arthur
d co-counsel for all of the other Kent State
except the Scheuers, cooperating fully with
sel representing any of the Kent State plain-
ing this period, I devoted my total energy,
s per week, including evenings, to profes-
orts on behalf of the Kent State plaintiffs.

---

[5] the Sindell 20 percent assignment of fees to
ompensate Kelner for his assumption of the role
is not established in the record. Because there
in the record of any agreement allowing addi-
oseph Kelner to compensate him for services as
the first trial, this court's apportionment of fees,
the agreements of record, makes no allowance to
r to his son for any extra lead services that they
ormed in the first trial or extra responsibilities
y undertook.

justed total of $33,420 represents $34,830 plus
ent of Mandel fees), plus $640 (50 percent of
Miller-Holstein) less 20 percent to Kelner of total
355.00).

e estimate of the time so spent during
ine hundred (900) hours.

d that a fair apportionment of $1,250
Krause is $320 to Steven A. Sindell
the contingent fee contract and also
to discharge Mr. Sindell) and $960
recognizing his services as sole counsel
during the second trial).

0,000 attorney fee fund is apportioned

ell (and his present and former firms)

l—$6,305
—$9,507
—$960

the oral order made during today's
er ordered that the entire $25,000 out-
fund is awarded to, and shall be paid
ford Jay Rosen to the Board of Church
United Methodist Church. During the
ard spent more than this sum in helping
of plaintiffs' prosecution of the Kent
cases at least up to and through Jan-

dered that the foregoing orders of this
to the distribution of the $50,000 attor-
constitute a full and final disposition
of all claims and matters relating to
e various parties who have participated
s by filing claims for fees and by any
did not file any such claim for fees

,000 settlement fund reserved for the aid to the plaintiffs, without any re- n, as previously itemized in this court's January 4, 1979.

r any suit or claim be filed in any ng, of course, any appeal from these court), the court reserves jurisdiction ate and effective writ or order either 51 or 28 U.S.C. §2283 to "protect and rs of this court.

RED.

/s/ WILLIAM K. THOMAS
United States District Judge

THE UNITED STATES
RICT COURT

March 12, 1979)

59 and C72-439

TES DISTRICT COURT
DISTRICT OF OHIO
TERN DIVISION

Administratrix of the Estate of
E SCHEUER, Deceased,
Plaintiff,

v.

A. RHODES, *et al.*,
Defendants.

ORDER

tled and dismissed with prejudice
tions set forth in the January 4,
been taxed and paid.

r, is reserved to enter appropriate

his court's memorandum and order
Kent State discovery materials);
nd order of March 9, 1979 (attor-

ect, and effectuate the final orders
n (1).

D.

ffs:

ants:

/s/ WILLIAM K. THOMAS
United States District Judge

C71-21

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN R. CLEARY and ROBERT CLEARY,
Plaintiffs,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

The complaint is settled and dismissed with prejudice on the terms and conditions set forth in the January 4, 1979 order, costs having been taxed and paid.

Jurisdiction, however, is reserved to enter appropriate final orders:

(1) that relate to this court's memorandum and order of February 28, 1979 (Kent State discovery materials); and the memorandum and order of March 9, 1979 (attorney fees and expenses);

(2) to enforce, protect, and effectuate the final orders entered under paragraph (1).

IT IS SO ORDERED.

Counsel for the Plaintiffs:

Sanford Jay Rosen
Reese Davis
Davis Engdahl

Counsel for the Defendants:

Burt J. Fulton
Charles E. Brown
Charles Shanklin

/s/ WILLIAM K. THOMAS
United States District Judge

C71-22

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DONALD SCOTT MACKENZIE,
Plaintiff,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

The complaint is settled and dismissed with prejudice on the terms and conditions set forth in the January 4, 1979 order, costs having been taxed and paid.

Jurisdiction, however, is reserved to enter appropriate final orders:

(1) that relate to this court's memorandum and order of February 28, 1979 (Kent State discovery materials); and the memorandum and order of March 9, 1979 (attorney fees and expenses);

(2) to enforce, protect, and effectuate the final orders entered under paragraph (1).

IT IS SO ORDERED.

Counsel for the Plaintiffs:

Sanford Jay Rosen
Reese Davis
Davis Engdahl

Counsel for the Defendants:

Burt J. Fulton
Charles E. Brown
Charles Shanklin

/s/ WILLIAM K. THOMAS
United States District Judge

C71-23
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOUGLAS WRENTMORE,
Plaintiff,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

The complaint is settled and dismissed with prejudice on the terms and conditions set forth in the January 4, 1979 order, costs having been taxed and paid.

Jurisdiction, however, is reserved to enter appropriate final orders:

(1) that relate to this court's memorandum and order of February 28, 1979 (Kent State discovery materials); and the memorandum and order of March 9, 1979 (attorney fees and expenses);

(2) to enforce, protect, and effectuate the final orders entered under paragraph (1).

IT IS SO ORDERED.

Counsel for the Plaintiffs:

Sanford Jay Rosen
Reese Davis
Davis Engdahl

Counsel for the Defendants:

Burt J. Fulton
Charles E. Brown
Charles Shanklin

/s/ WILLIAM K. THOMAS
United States District Judge

C71-25

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES D. RUSSELL,
Plaintiff,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

The complaint is settled and dismissed with prejudice on the terms and conditions set forth in the January 4, 1979 order, costs having been taxed and paid.

Jurisdiction, however, is reserved to enter appropriate
l orders:

(1) that relate to this court's memorandum and order
February 28, 1979 (Kent State discovery materials);
the memorandum and order of March 9, 1979 (attor-
fees and expenses);

(2) to enforce, protect, and effectuate the final orders
ered under paragraph (1).

IT IS SO ORDERED.

nsel for the Plaintiffs:

Sanford Jay Rosen
Reese Davis
Davis Engdahl

nsel for the Defendants:

Burt J. Fulton
Charles E. Brown
Charles Shanklin

/s/ WILLIAM K. THOMAS
United States District Judge

C71-24

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. GRACE and THOMAS V. GRACE,
Plaintiffs,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

The complaint is settled and dismissed with prejudice the terms and conditions set forth in the January 4, 9 order, costs having been taxed and paid.

Jurisdiction, however, is reserved to enter appropriate l orders:

(1) that relate to this court's memorandum and order February 28, 1979 (Kent State discovery materials); the memorandum and order of March 9, 1979 (attor- fees and expenses);

(2) to enforce, protect, and effectuate the final orders ered under paragraph (1).

IT IS SO ORDERED.

nsel for the Plaintiffs:

Sanford Jay Rosen
Reese Davis
Davis Engdahl

for the Defendants:

t J. Fulton
rles E. Brown
rles Shanklin

/s/ WILLIAM K. THOMAS
United States District Judge

C71-26

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALAN M. CANFORA,
Plaintiff,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

complaint is settled and dismissed with prejudice
terms and conditions set forth in the January 4,
ler, costs having been taxed and paid.

isdiction, however, is reserved to enter appropriate
lers:

that relate to this court's memorandum and order
uary 28, 1979 (Kent State discovery materials);
memorandum and order of March 9, 1979 (attor-
s and expenses);

to enforce, protect, and effectuate the final orders
under paragraph (1).

IS SO ORDERED.

for the Plaintiffs:

ord Jay Rosen
e Davis
s Engdahl

for the Defendants:

J. Fulton
les E. Brown
les Shanklin

/s/ WILLIAM K. THOMAS
United States District Judge

C73-643

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BERT F. STAMPS and FLOYD STAMPS,
Plaintiffs,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

complaint is settled and dismissed with prejudice
erms and conditions set forth in the January 4,
er, costs having been taxed and paid.

diction, however, is reserved to enter appropriate
ers:

that relate to this court's memorandum and order
ary 28, 1979 (Kent State discovery materials);

orandum and order of March 9, 1979 (attor-
expenses);

nforce, protect, and effectuate the final orders
paragraph (1).

ORDERED.

he Plaintiffs:

Jay Rosen
vis
gdahl

he Defendants:

Fulton
. Brown
Shanklin

/s/ WILLIAM K. THOMAS
United States District Judge

C70-544 and C71-470

ITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KRAUSE, Administrator of the Estate of
ALLISON KRAUSE, Deceased,
Plaintiff,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

laint is settled and dismissed with prejudice
and conditions set forth in the January 4,
sts having been taxed and paid.

on, however, is reserved to enter appropriate

relate to this court's memorandum and order
28, 1979 (Kent State discovery materials);
orandum and order of March 9, 1979 (attor-
expenses);

nforce, protect, and effectuate the final orders
r paragraph (1).

ORDERED.

he Plaintiffs:
Jay Rosen
vis
gdahl

efendants:

own
lin

/s/ WILLIAM K. THOMAS
United States District Judge

C70-816

STATES DISTRICT COURT
THERN DISTRICT OF OHIO
EASTERN DIVISION

R HOLSTEIN, Administratrix of the
FREY GLENN MILLER, Deceased,
Plaintiff,

v.

MES A. RHODES, *et al.*,
Defendants.

ORDER

is settled and dismissed with prejudice
conditions set forth in the January 4,
aving been taxed and paid.

owever, is reserved to enter appropriate

e to this court's memorandum and order
979 (Kent State discovery materials);
lum and order of March 9, 1979 (attor-
nses);

e, protect, and effectuate the final orders
agraph (1).

DERED.

intiffs:

sen

endants:

vn

n

/s/ WILLIAM K. THOMAS
United States District Judge

C71-20

STATES DISTRICT COURT
HERN DISTRICT OF OHIO
EASTERN DIVISION

OEDER, Administrator of the Estate
M K. SCHROEDER, Deceased,
Plaintiff,

v.

IES A. RHODES, *et al.*,
Defendants.

ORDER

s settled and dismissed with prejudice
onditions set forth in the January 4,
ving been taxed and paid.

vever, is reserved to enter appropriate

to this court's memorandum and order
79 (Kent State discovery materials);

d order of March 9, 1979 (attor-

ect, and effectuate the final orders
(1).

).

's:

nts:

s/ WILLIAM K. THOMAS
United States District Judge

C71-471

TES DISTRICT COURT
DISTRICT OF OHIO
ERN DIVISION

INE KAHLER, JOSEPH JOHN
ELIZABETH LEWIS,
Plaintiffs,

v.

A. RHODES, *et al.*,
efendants.

ORDER

tled and dismissed with prejudice
ions set forth in the January 4,
been taxed and paid.

is reserved to enter appropriate

s court's memorandum and order
ent State discovery materials);
l order of March 9, 1979 (attor-

ct, and effectuate the final orders
(1).

:

ts:

/ WILLIAM K. THOMAS
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 15, 1979)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, Administrator of the Estate of ALLISON KRAUSE, Deceased,	)	C70-544
	)	C71-470
VS.	)	
JAMES A. RHODES, *et al.*	)	
SARAH SCHEUER, Administratrix of the Estate of SANDRA LEE SCHEUER, Deceased,	)	C70-859
	)	C72-439
VS.	)	
JAMES A. RHODES, *et al.*	)	
ELAINE MILLER HOLSTEIN, Administratrix of the Estate of JEFFREY GLENN MILLER, Deceased,	)	C70-816
VS.	)	
JAMES A. RHODES, *et al.*	)	
LOUIS A. SCHROEDER, Administrator of the Estate of WILLIAM K. SCHROEDER, Deceased,	)	C71-20
VS.	)	
JAMES A. RHODES, *et al.*	)	

DEAN KAHLER, ELAINE KAHLER, JOSEPH JOHN LEWIS and ELIZABETH LEWIS,	)	C71-471
vs.	)	
JAMES A. RHODES, *et al.*	)	
JOHN R. CLEARY and ROBERT CLEARY,	)	C71-21
vs.	)	
JAMES A. RHODES, *et al.*	)	
DONALD SCOTT MACKENZIE,	)	C71-22
vs.	)	
JAMES A. RHODES, *et al.*	)	
DOUGLAS WRENTMORE,	)	C71-23
vs.	)	
JAMES A. RHODES, *et al.*	)	
JAMES D. RUSSELL,	)	C71-25
vs.	)	
JAMES A. RHODES, *et al.*	)	
THOMAS M. GRACE and THOMAS V. GRACE,	)	C71-24
vs.	)	
JAMES A. RHODES, *et al.*	)	

ALAN M. CANFORA,	)	C71-26
	)	
vs.	)	
	)	
JAMES A. RHODES, *et al.*	)	
ROBERT F. STAMPS and FLOYD STAMPS,	)	C73-643
	)	
vs.	)	
	)	
JAMES A. RHODES, *et al.*	)	

ORDER

THOMAS, *J.*

This matter having come on before the court for hearings on February 6, 1979 and on March 9, 1979, and evidence having been entered in the record by stipulation of the parties, and the court having considered said evidence and arguments of counsel, and the court having thereafter filed its memorandum and order that apportioned the $50,000 attorney-fee fund and distributed the $25,000 out-of-pocket expense fund,

THEREFORE, pursuant to Rule 58 of the Federal Rules of Civil Procedure;

IT IS ORDERED THAT, limiting the fee claims of all counsel to said $50,000 attorney-fee fund, the trustee of said funds, Sanford Jay Rosen, shall apportion and pay said fund as follows:

Steven A. Sindell (and his present and former firm)	$33,740
Fred H. Mandel	6,305
Joseph and Robert Kelner	8,995
David Engdahl	960

IT IS FURTHER ORDERED that the trustee, Sanford Jay Rosen, shall pay the entire $25,000 out-of-pocket expense fund to the Board of Church and Society of the United Methodist Church.

The memorandum and orders of February 6, 1979 and March 9, 1979 are hereby adopted as findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT DISTRIBUTING SETTLEMENT FUND

(Filed March 26, 1979)

No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE,
Plaintiff,

vs.

JAMES A. RHODES, *et al.*,
Defendants.

KENT STATE CASES
JUDGE WILLIAM K. THOMAS

ORDER DISTRIBUTING SETTLEMENT FUND

The Kent State cases having been settled on Jan- y 4, 1979 and the matter of allocation of attorneys s and costs having been determined by this Court's nions of February 6, 1979 and March 9, 1979,

THEREFORE IT IS ORDERED THAT:

1. On or as soon as practicable after April 1, 1979, the stee, Sanford Jay Rosen, shall distribute the settlement d in the following amounts:

tiffs-Beneficiaries

N KAHLER	$350,000
HUR KRAUSE, Administrator of the Es- e of ALLISON KRAUSE, Deceased	15,000
AH SCHEUER, Administratrix of the Estate SANDRA LEE SCHEUER, Deceased	15,000
INE MILLER HOLSTEIN, Administratrix the Estate of JEFFREY GLENN MILLER, ceased	15,000
IS A. SCHROEDER, Administrator of the tate of WILLIAM K. SCHROEDER, De- ased	15,000
N CANFORA	15,000
N CLEARY	22,500
GRACE	37,500
EPH LEWIS	42,500
ALD SCOTT MACKENZIE	27,500
ES D. RUSSELL	15,000
ERT F. STAMPS	15,000
GLAS WRENTMORE	15,000
rneys	
VEN A. SINDELL (and his present and mer firms)	33,740
D H. MANDEL	6,305
EPH and ROBERT KELNER	8,995
ID ENGDAHL	960
RD OF CHURCH AND SOCIETY, UNITED ETHODIST CHURCH	25,000

The interest which shall have accrued to the fund
e date of distribution of the Principal may be dis-
from time to time to pay the provable expenses
nistering and maintaining the trust and concluding
ending the settlement of these cases as per this
order of February 6, 1979 (Exhibit A hereto). The
will submit to the Court periodic documentation
expenses, for Court approval.

The Court finds that such use of the interest is
to the implementation of the settlement and
t fund as no other resources exist for this purpose.

Upon the final termination of this matter, any
remaining after the disbursements permitted un-
agraph 2 above will be paid to the payees of the
proportion to their shares as listed in paragraph 1

This Court retains jurisdiction in this matter to
y appropriate and effective writ or order either
8 U.S.C. §1651 or 28 U.S.C. §2283 to "protect and
te" the orders of this Court.

S SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge

EXHIBIT A

ROSEN, REMCHO & HENDERSON
Attorney at Law
155 Montgomery Street - 15th Floor
San Francisco, California 94104
Telephone (413) 433-6830

February 2, 1979

rable William K. Thomas
3. District Court
District of Ohio b
thouse, Room 338
ior Avenue
, Ohio 44114

ge Thomas: Re: Kent State Cases: C70-544

ler best to protect and serve the interests of the ies, I would respectfully request confirmation Court of my authority in respect to the follow- atters.

it is my belief that a better return on the set- und can be obtained by investment in certificates , which are adequately insured by the federal nt. Pursuant to our earlier conversation in u authorized such investments, I have placed 0 in such 30-day CD's at a simple interest rate n and 10 and 10.5%. The remaining $150,000 is day of deposit day of withdrawal savings ac- n addition, I would request authority to place ortion of the trust fund into United States Treas- They are freely negotiable and represent a igation of the United States thus making their en greater than bank deposits or certificates of hich are merely insured by a federal agency. The te on such treasury bills is approximately 9.5%.

I would respectfully request authority from
o use a portion of the interest on the settle-
to defray out-of-pocket costs in administering
ning the trust until final distribution and con-
settlement. These disbursements cover only
h as postage, telephone, photocopying, travel,
costs of my support personnel, to the extent
salary costs are directly attributable to ad-
the trust fund and concluding the settlement.
commendation that I be permitted to advance
subject to reimbursement out of interest only
ntation to the Court of monthly statements
ne charges incurred as well as a statement
st earned to date on the various deposits. Each
iff-beneficiaries of the trust fund has been in-
such authority would be sought and has agreed
sed request to so use a portion of the interest.

urt's attention to these requests for instructions
preciated.

Respectfully,

ROSEN, REMCHO & HENDERSON
/s/ SANFORD JAY ROSEN
Sanford Jay Rosen

ulton, Esq.
s E. Brown, Esq.
l Szolosi, Esq.
s Shanklin, Esq.
avis, Esq.
Karl, Esq.
even Keller
Engdahl, Esq.

79
ed. It is so ordered

WILLIAM K. THOMAS

AND ORDER OF THE COURT OF ALS FOR THE SIXTH CIRCUIT

(Filed March 27, 1981)

Nos. 79-3115, 79-3202

ED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, *et al.*,
Plaintiffs,

v.

JAMES A. RHODES, *et al.*,
Defendants,

WE & GUIDUBALDI, A Partnership, *et al.*,
Appellants,

IEY GENERAL OF OHIO, Intervenor,
Appellee.

---

from the United States District Court
r the Northern District of Ohio,
Eastern Division.

DWARDS, *Chief Judge*, LIVELY, *Circuit Judge*
enior Circuit Judge.

Chief Judge. Steven Sindell, the original
f the plaintiffs in the 1970 Kent State shoot-

s from orders entered by Judge William
oving a settlement of this lengthy and
gation.

ds that his 33 1/3% contingency fee con-
ntation of these plaintiffs invalidate the
ocation of attorneys' fees occasioned by
's approval of $675,000 "settlement" be-
f Ohio[2] and the litigants. As appellant
tates the matter:

he substantive or procedural issues of the
are presented here for review. Rather,
hallenges the authority of the District
extinguished, as an integral part of the
rivate contractual agreements between
and their attorneys and to have substi-
e a "reasonable" attorney's fee, all with-
fit of any hearing, evidence or briefs

this case is a long and tortuous one. The
ally filed in 1970, were dismissed by the

solidated cases damages were sought by nine
the personal representatives of four persons
Kent State University on May 4, 1970. The
ernor of Ohio, the president of the university
and enlisted members of the Ohio National
d to have "intentionally, recklessly, willfully
ed an unnecessary deployment of the Ohio
he Kent State campus and, in the same man-
ard members to perform allegedly illegal ac-
d in this historic tragedy. The complaints
tion under the Civil Rights Act of 1871, 17
C. § 1983 (1976).

Ohio was not a party to this action.

ndell was afforded two opportunities to voice
limitation on attorneys' fees, although both
ed after entry of the settlement orders chal-

theory that essentially the action was
Ohio and barred by the Eleventh
peal, this court affirmed these dis-
anel. *See Krause v. Rhodes*, 471 F.2d
The United States Supreme Court,
y reversed the judgments below and
cheuer v. Rhodes, 416 U.S. 232 (1974).
he jury returned a verdict for defen-
action.

is adverse jury verdict, all plaintiffs
ncluding Steven Sindell) signed an
he American Civil Liberties Union
sel "for purposes of all appellate pro-
tion." Sanford Jay Rosen headed a
ers in prosecuting the successful ap-
ich reversed for new trial. *Krause v.*
(6th Cir. 1977), *cert. denied*, 435 U.S.
d his team also represented plaintiffs
of the second trial of this case and
ch led to settlement.

ttled by an agreement entered into
wyers except Sindell. The State of
this litigation) voluntarily offered to
settlement, provided that $600,000 of
ectly to plaintiffs undiluted by legal
dge Thomas entered a settlement and
ding for payment of $600,000 to plain-
nt in full to the attorneys, and $25,000
t expenses. The ACLU and most of
including lead counsel Rosen, agreed
and subsequently agreed to Judge
of the $50,000 attorneys' fees fund.
d distribution of the $50,000 to con-
olders and apparently based the fund's

erformed prior to the first adverse
ng for this purpose any of the ser-
el in the successful effort to reverse
sequent retrial which produced the
Thus, law firms associated with
d $33,740 of the $50,000 fund, while
yers associated therewith received
s.[4]

argument before this court is a
a contingent fee agreement is be-
leral judge to invalidate or modify
oever. Judge Thomas, however,
mit attorneys' fees in these cases
ourt's traditional power to resolve
igants and their counsel. In this
v. Chrysler Corp., 565 F.2d 841
rican Federation of Tobacco Grow-
(4th Cir. 1951).

d be helpful to an understanding
rate Judge Thomas' discussion of
e of the settlement, contained in
, 1979:

January 16, 1979, Robert F. Ho-
nt of the State Controlling Board
io's draft in the amount of $675,-

tated:

rized to act only pursuant to Con-
ard request No. E47, as approved

iled a separate "conditional appeal"
on the basis of this opinion) seeking
appropriate fee in the event Sindell's
voiding the settlement. *See Krause*
Cir. March 27, 1981).

979. Enclosed herewith, please
this authorizing document, with
ttlement and Dismissal Order in-
erein and attached thereto as Ex-

ed:

u carefully note that the subject
nted only under the terms of this
ment and Dismissal Order upon
ntrolling Board's approval is con-
other words, any distribution of
her than as provided in the Set-
Dismissal Order would violate
under which the enclosed draft
It is certainly our understanding
ord J. Rosen as Trustee for dis-
be accordingly bound to these
ditions.

trolling Board E47 Request for
0.00 Kent State Settlement Fund

eto as "Exhibit A," and incor-
by reference, is a document en-
ent and Dismissal Order. As
by the Order, OBM's request is
pon the terms and requirements
in.

are attached to Order One of
which I delivered to Sanford J.
io draft in the amount of $675,-
ecifically provides that Sanford
carry out his trusteeship pur-
Order of January 4, 1979 and
Howarth.

As previously read, the order of January 4, 1979 specifies that $50,000 shall be paid in full for attorney fees and $25,000 as out-of-pocket expenses. $600,000 shall be paid to the plaintiffs as itemized in the attached list.

It was this precise breakdown and allocation of the total settlement fund of $675,000 that was presented to and approved by plaintiffs and their counsel when this court met with plaintiffs and their counsel on the morning of Wednesday, December 6, before court opened. Defendants likewise were informed of and approved the settlement and breakdown.

The same total settlement fund and the breakdown of $600,000 as itemized for each of the plaintiffs, $50,000 as payment in full for attorney fees, $25,000 as out-of-pocket expenses, was fully disclosed by me to President Oliver Ocasek of the Ohio Senate and Speaker Vernon Riffe of the Ohio House of Representatives. This occurred when these legislative leaders met with me in this court house on the afternoon of December 6, 1978.

Previously informed of the contingent fee contracts of appellant Sindell and other former counsel, I had fixed the $50,000 to provide for any contingent fee claim.

Because I knew that the State of Ohio would not make payment of a settlement fund of $675,000 if the contingent fees were charged against the fund or against any of the individual plaintiffs, I fixed $50,000 as payment in full for all attorney fees.

Without this limitation of attorney fees, there would have been no settlement of the Kent State cases by the State of Ohio. That is made clear by the express

wording of the State Controlling Board request No. E47 which I have just read, as it was approved on January 4, 1979.

Under these circumstances, this court, acting in its discretion under 42 U.S.C. § 1988, as amended, allowed the plaintiffs "a reasonable attorney's fee" of $50,000.

It is appreciated that under some circumstances in a civil rights action prosecuted under section 1983, contingent fees may be charged while additional attorney fees under section 1988 would not be allowed by the court. See *Zarcone v. Perry*, 581 F.2d 1039.

But under the present circumstances, in order to effect a settlement and to end this litigation which seemed as if it would never end, it was indispensable that this court fix attorney fees under section 1988 and that the fees so fixed should modify and supercede any contractual contingent fees of former counsel of these plaintiffs.

If to achieve the settlement it was necessary to limit attorney fees to $50,000, it is also fair under the circumstances to do this.

Undoubtedly countless hours of legal services have been performed on behalf of the plaintiffs by Steven A. Sindell and many other attorneys from the inception of this litigation through the unsuccessful first trial in late August, 1975.

But, it is also true that Steven A. Sindell did not conduct the appeal that obtained a new trial, without which there would have been no second trial and no settlement. A legal team headed by Sanford Jay Rosen represented the plaintiffs in their successful appeal. These attorneys, and not former counsel, have repre-

sented the plaintiffs through the second trial and settlement.

These foregoing circumstances make it clear that Steven A. Sindell has played no part in creating the settlement fund. I can personally attest to this fact. Yet, it was nonetheless determined by this court to reserve $50,000 of the settlement fund out of which to ratably compensate any former counsel who may have had contingent fee contracts with any of the plaintiffs.

Certainly, this case is unique in the annals of litigation in the United States Courts. Judge Thomas found no exact controlling precedent for the actions which he felt required to take, nor do we. Nonetheless, we feel that his approval of the "settlement" offered by the State of Ohio, conditioned specifically upon $600,000 going to the individual plaintiffs without reduction by attorneys' fees, was within his judicial discretion.

A federal district judge has broad equity power to supervise the collection of attorneys' fees under contingent fee contracts. As has often been stated,

> where an attorney recovers a fund in a suit under a contract with a client providing that he shall be compensated only out of the fund he creates, the court having jurisdiction of the subject matter of the suit has power to fix the attorney's compensation and direct its payment out of the fund.

Garrett v. McRee, 201 F.2d 250, 253 (10th Cir. 1953), *quoted in Cappel v. Adams*, 434 F.2d 1278, 1279 (5th Cir. 1970). Further, "[t]he sum determined to be a reasonable attorney's fee is within the discretion of the district court; before a reviewing court should disturb the holding there should be a clear showing that the trial judge abused

his discretion." *Cappel v. Adams, supra,* at 1280. Thus, an attorney's right to contract for a contingent fee is not completely beyond judicial control.[5]

Indeed, the Code of Professional Responsibility (CPR) of the American Bar Association imposes considerable limitations upon the ability of lawyers to contract for contingent fees. *See* DR 2-106 and EC2-20.[6] As indicated

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5. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), also provided Judge Thomas discretion to "allow the prevailing party . . . a *reasonable* attorney's fee as part of the costs." (Emphasis added.) While the language of § 1988 does not expressly empower a district court to limit fees derived under a private agreement between the prevailing attorney and his client, it is indicative of the extensive powers available to district judges in supervising attorneys' fees awards in civil rights cases.

6. DR 2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(Continued on following page)

y the drafters' footnotes, the cited CPR provisions are ased largely upon Canon 13 of the old ABA Canons f Professional Ethics, adopted in 1908. Canon 13 provided:

'ootnote continued—

(8) Whether the fee is fixed or contingent.[89]

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

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89. *Cf.* ABA CANON 13; *see generally* MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964) (A Report of the American Bar Foundation).

EC 2-20 Contingent fee arrangements[30] in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.

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30. *See* ABA CANON 13; *see also* MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964) (A report of the American Bar Foundation).

"A contract for a reasonable contingent fee where sanctioned by law is permitted by *Canon 13*, but the client must remain responsible to the lawyer for expenses advanced by the latter. 'There is to be no barter of the privilege of prosecuting a cause for gain in exchange for the promise of the attorney to prosecute at his own expense.' (Cardozo, C. J. in Matter of Gilman, 251 N.Y. 265, 270-271)" *ABA Opinion* 246 (1942).

Contingent Fees.

A contract for a contingent fee, where sanctioned
y law, should be reasonable under all the circum-
ances of the case, including the risk and uncertainty
the compensation, *but should always be subject
the supervision of a court, as to its reasonableness.*

hasis added.)

nder the facts of this case, to allow Sindell to enforce
ntingent fees to the letter would be, as the District
obviously agreed, totally unreasonable.[7] At the out-
ad the court accepted Sindell's position, it would
been unable to approve the settlement and there
have been no funds to disburse in any manner.
State of Ohio had conditioned its settlement offer
the plaintiffs' "netting" $600,000. The State cannot
been motivated by the same reasoning which ordi-
prompts litigants to settle cases; Ohio had a stake
st in disposing of litigation but in calming the bitter
ct over this case which had raged within its borders—
ll as throughout the nation. Thus, the limitations
ed on fee recoveries were absolutely essential to
settlement of this unique case.

Ve acknowledge that, due to the great effort expended
aining and preparing for the first (and wholly unsuc-
l) trial of this case, Sindell's billing on a time and
ial basis might equal or exceed the 33 1/3% contin-
fee for which he contracted. This, however, is not
ly aspect to be considered in assessing the reasonable-
of an attorney's fee. A contingent fee arrangement
be such that what was in the first instance a fair

---

[7] Particularly since Sindell's firm took the "lion's share" $50,000 fund, despite his failure to produce any monetary for plaintiffs.

t becomes unfair in its enforcement." *In re Fried-*
36 App. Div. 750, 121 N.Y.S. 426, 428, *aff'd* 199
7, 92 N.E. 1085 (1910). *See also Rodgers v. Sound*
ic Co., 67 Misc.2d 412, 324 N.Y.S. 2d 423, 425 (Sup.
1). Clearly, however reasonable and appropriate
tant fee contracts were when signed, the situation
isting differs drastically from that which the con-
g parties originally contemplated.

e wish to add that the District Court's actions here
ot wholly unprecedented. In *In re Friedman, supra,*
mple, the trial court (sua sponte) reduced a lawyer's
ent fee from an agreed upon 50% of the $8,000
ent to $2,150. A New York appellate court affirmed
uction, declaring:

> The contract between the parties was not per
> fraudulent, nor evidence of improper or undue ad-
> ntage. One-half of a recovery as contingent pay-
> nt for legal services may be more beneficial to
> client than to the lawyer. . . . Nevertheless
> recovery may be such that the lawyer's retention
> it would be unjustified, and would expose him
> the reproach of oppression and overreaching. *He*
> *an officer of the court, and is judged as such, and*
> *hnical contractual rights must yield to his duty*
> *such officer.*

N.Y.S. at 427-28 (emphasis added).

Wade v. Clemmons, 84 Misc. 2d 822, 377 N.Y.S.
(Sup. Ct. 1975), an attorney demanded strict en-
ent of his contingent fee contract, even though such
ement (when coupled with other claims against the
ent fund) would have denied his client any recov-
he trial court reduced the fee, however, stating:

this situation, a fair contract becomes unfair
nforcement. The lawyer's retention of his full
ee is unjustified and exposes him to an accusa-
oppression and overreaching.

e court will not sit by and give its pro forma
al. It has the "power to compel attorneys to
itably and fairly towards their clients". (*Rob-
. Rogers*, 237 N.Y. 467, 472, 143 N.E. 647, 649
)].)

Y.S. 2d at 420. By comparison, had Sindell
n upsetting the instant settlement, these plain-
well have gone totally uncompensated at a

ing, we note that Steven Sindell failed to pro-
nonetary benefit for these plaintiffs. We also
t the ACLU lawyers who obtained this settle-
eceiving nothing for their services. Under these
award of $33,740 to Sindell and his present
aw firms is at least fair compensation.

ppropriate that we now ring down the curtain
gic drama which so bitterly divided our nation
le of the '70's.

dgment of the District Court is affirmed.

NT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 27, 1981)

Nos. 79-3115, 79-3202

ITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, *et al.*,
Plaintiffs,

VS.

JAMES A. RHODES, *et al.*,
Defendants,

SINDELL, LOWE & GUIDUBALDI,
A Partnership, *et al.*,
Appellants,

ATTORNEY GENERAL OF OHIO,
Intervenor, Appellee.

From the United States District Court for the thern District of Ohio, Eastern Division.

OWARDS, *Chief Judge,* LIVELY, *Circuit Judge* and HILLIPS, *Senior Circuit Judge.*

JUDGMENT

CAUSE came on to be heard on the record from States District Court for the Northern District tern Division and was argued by counsel.

ERATION WHEREOF, It is now here or-
ged by this Court that the judgment of
Court in this cause be and the same is

bear own costs on appeal.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

e: June 19, 1981